focus on

The Law of the Videogaming Jungle

A prominent, Hollywood-based entertainment lawyer examines the legal controversies which plague videogaming — matters that are costing their manufacturers millions.

By Steve Burkow, Esq.

In recent months, the battleground in the highly competitive videogame field has shifted from the stores to the courts. Everywhere you turn, someone is hurling allegations at someone else.

Atari is suing Coleco for alleged patent infringement on their expansion module, and Coleco has accused Atari, in the courts, of trying to monopolize the videogame industry.

Atari is simultaneously doing battle with Imagic over alleged similarities between *Demon Attack* and *Phoenix*, while *Donkey Kong* and its maker Nintendo have their paws full with a legal challenge from King Kong and Universal Pictures.

In previous issues, you read how Tarzan and *Jungle King*, *Pac-Man* and *K.C. Munchkin*, *Jaws* and *Lochjaw*, and numerous other games have all been involved in legal slugfests.

Why is it that everyone's so litigious?

For the most part, videogame companies are all fighting to hold on to what they deem as their share of the market. This is accomplished by challenging a game which seems inordinately derivative, whether it's *K.C. Munchkin* or one of the numerous "knock-off" games which flood the country, the *Congorillas* and their ilk.

At the same time, a lawsuit in the court can be worth two in the bush: these cases often tend to discourage *fresh* competition. A small company thinking of entering the field with a cartridge which *might* be similar to an existing game is going to think twice if it may involve doing battle with a giant. Even if a case is without legal merit, the cost of fighting it can run a *minimum* of twenty or thirty thousand dollars — if you're lucky.

The arcade game* Jungle King *became* Jungle Hunt *after Tarzan took it to court.

But there are matters beyond this matter of competition which the law is now addressing in the videogame field.

Of all the legal cases currently making their way through the courts, perhaps the most interesting are those involving American Multiple Industries, Inc., a manufacturer of so-called "X-rated" videogames.

Most of the controversy focuses on one of the company's games, *Custer's Revenge*, where players are given points for successfully "joining" female figures represented by Indian maidens with a pants-less male figure identified as General Custer.

On a purely societal level, this cartridge has angered, among others, Indians and women's groups. They claim that the game is degrading, though the cartridge seems to be selling quite well in spite of (or because of) the bad publicity.

On the legal front, American Multiple also has its hands full with Atari. Because the new company's games are compatible with the 2600 hardware, Atari is concerned the public will somehow draw the conclusion that Atari's products are not suitable for family use.

(It will be interesting to see if Coleco joins the fray, since *Custer's Revenge* also plays on their expansion module.)

Nor is Atari alone in their concerns. Similar arguments have been leveled against American Multiple by some civic organizations. These groups argue that they have the right to restrict the commerce of businesses which they feel harm the public interest.

Not surprisingly, American Multiple has cried "foul," stating that any attempt to prohibit sale of the cartridge constitutes an abridgement of their First Ammendment right to freedom of expression. In an effort to protect this freedom, late last year American Multiple filed an eleven million dollar action against Suffolk County in Long Island and one of the country's elected officials charging that the county and the official were unconstitutionally moving to prohibit sales of game cartridges.

Thusfar, there has been no formal response from Suffolk County or the individual named, though officials previously stated that American Multiple's right to freedom of expression is outweighed by the county's right to take whatever action is necessary since the company's business constitutes, in their mind, a danger to the health and safety of local citizens.

The courts have not yet dealt with this issue. The closest they have come to controversies of this type has been in the area of adult bookstores. The Supreme Court has held, essentially, that municipalities have the power to zone such enterprises out of existence. They do this by designating a certain area as the only one in which proprietors of adult wares can do business. If such zones are in the most undesirable part of town (which invariably they are), this imposes a significant hardship on that type of business.

The case of American Multiple is considerably different, however, in that "legitimate" videogame shops are selling their software. Hence, the problem is not merely one of rezoning.

At this point, it is impossible to predict which side will prevail. American Multiple's best argument might be that its games are no different from adult-oriented video cassettes of films such as *Deep Throat*, which are also dispensed at these outlets. Communities have thusfar been unable to stop the sale of such material.

Yet, the problems faced by American Multiple are only the tip of the iceberg as far as videogames and the law are concerned.

Here's another facet altogether.

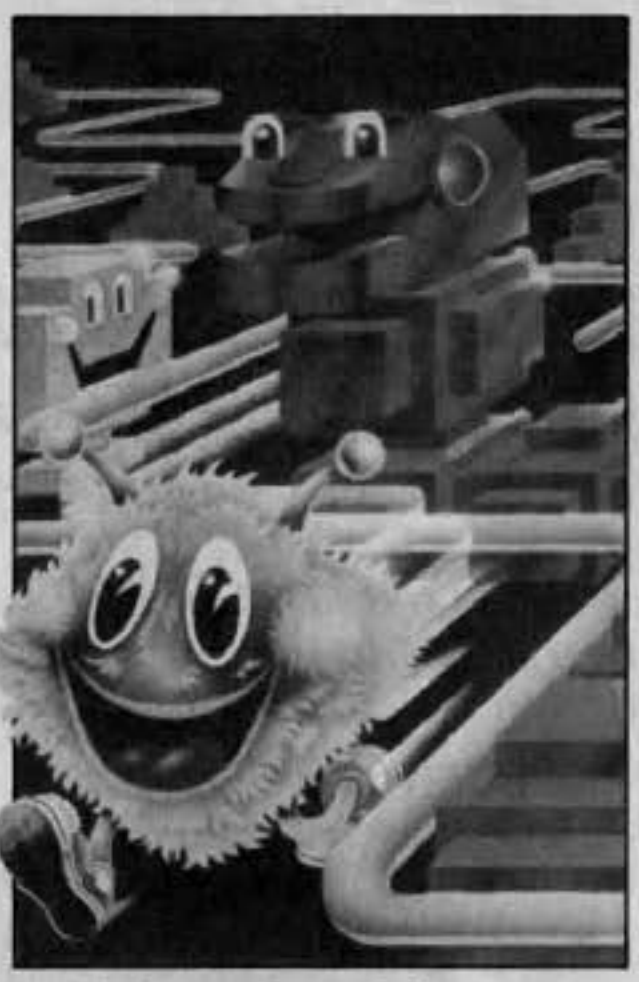
Suppose you're the next great computer programming wizard, someone like the ambitious Flynn in *Tron*. Suppose you've come up with a software program worth millions. How do you prevent yourself from being ripped off if you bring your brainchild to a manufacturer?

This may not matter to you today, but next week you might be sitting at your Atari 800 and come up with a game program which you simply *must* try to get produced. ...

The primary avenues of protection are copyright and patent law.

The Copyright Act of 1976 was specifically ammended to include computer programs. Thus, under copyright law, the software — that is, the program or game as opposed to the physical disk or cartridge itself — can be protected.

The author, in this case the individual who develops a particular software program, is immediately and automatically entitled to copyright protection once the concept is on a disk, or at least committed to paper. If he or she does all the paperwork required, giving the public notice that he or she owns the program, the copyright is eminently enforceable.



K.C.'s Krazy Chase ***is the successor to the much-lauded*** **K.C. Munchkin,** ***which was ordered off the market when*** **Pac-Man** ***took it to court and won. Odyssey dropped the case in the lap of the Supreme Court. Unfortunately, that august body has refused to hear the case.***

The drawback with copyright is that it doesn't cover a novel piece of hardware, such as a revolutionary joystick or console. For relief in this area, you must look into patent law.

Patent law is designed to protect a new or useful process. In other words, the element of "novelty" must be present for protection. Mere ideas, scientific discoveries, and formulae are not patentable. Anyone can use them. Software programs which rely on mathematical formulae, then, don't automatically qualify for patent protection.

A patent protects an inventor against other individuals who independently but later in time, develop a similar work. If they do, they're out of luck: patents are handed out on a first come, first served basis. The essence of patent protection is to encourage and reward inventors.

Hardware and software are thus pretty well covered by patents and copyrights, respectively. But there's a catch.

If you haven't filed all the appropriate documents and adhered strictly to the process of recording your work, it's terribly difficult to prove that you came up with an idea which you feel someone else has appropriated. In short, an inventor can't really enjoy this full protection until there's something to protect. It's easier, for example, for an author to enforce a copyright on a book that's in-print rather than to enjoin a work which is similar to a manuscript tucked in a drawer. The copyright may be no less valid on the manuscript — but go and prove beyond a doubt when the manuscript was written.

In other words, it's easier to protect something once it's been produced.

How, then, to get something into production while guaranteeing that the idea won't be stolen? That's where the doctrine of trade secrecy comes in handy.

This doctrine protects the individual who has elected to disclose an idea to other parties in order to develop the game or equipment. Secrecy is legally accomplished through written, contractual agreements where all individuals with whom the programmer — or writer or engineer — has contact agree to adhere to a non-disclosure pact.

Many experts suggest that the most prudent course to follow is to adhere to trade secrecy until you're out in the marketplace, at which time it's no longer a secret and copyright can take over.

These are just a few of the legal wrinkles which affect videogames and computers. I'll be stopping by the "Eye On" section every issue or so with brief overviews on the latest in videogame law and legal battles.

Two of the three cartridges produced by American Multiple Industries. The third game, about General Custer and a captive Indian maiden, was recently taken off the market under pressure.